No. 18149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD JOSEPH BLACKWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

STATEMENT OF JURISDICTION.

Appellant was adjudged guilty by the United States District Court for the Southern District of California of (1) illegally importing methadon, a narcotic drug, (2) concealing and facilitating the concealment and transportation of the same methadon, both in violation of Title 21, United States Code, Sections 173 and 174, as charged in Counts One and Two respectively; and (3) failing to register with a Customs official as a convicted violator of a narcotic law of the State of California, in violation of Title 18, United States Code, Section 1407, as charged in Count Three of the Indictment.

The offenses occurred in San Diego County in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

Appellant is charged in a three count Indictment, returned December 6, 1961, with the violations set forth above. Appellant plead guilty to Count One on December 12, 1961, but thereafter on January 2, 1962, the plea of guilty was set aside and the case proceeded to trial by the Court on all three counts on March 13, 1962, the Appellant having waived jury pursuant to Section 23a of the Federal Rules of Criminal Procedure.

On March 26, 1962, the Court found Appellant guilty of all three counts and sentenced him to five years imprisonment on each of Counts One and Two to run concurrently and on Count Three imposition of sentence was suspended and Appellant was placed on probation for a period of five years.

Timely notice of appeal was filed by Appellant who was permitted to proceed *in forma pauperis*.

III.
ERROR SPECIFIED.

Appellant has specified in effect that the trial court erred in not acquitting Appellant in that the evidence upon which the Court rested its decision established entrapment as a matter of law.

IV.
STATEMENT OF FACTS.

Government's Case.

At approximately 4:20 p.m. on November 12, 1961, Appellant walked into the United States from Mexico at the San Diego (San Ysidro) Port of Entry in San Diego County [R. T. 17-19, 20][1]. Appellant stated

[1]R. T. refers to Reporter's Transcript of Proceedings.

to the Customs Inspector in the pedestrian line that he was a citizen of the United States and was bringing nothing into the United States from Mexico. He then proceeded a few yards beyond this first inspection point where he was interrogated by another Customs Inspector [R. T. 2]. In response to further inquiry Appellant declared nothing other than a piece of lace [R. T. 22].

Appellant had not registered as a narcotics violator nor attempted to register by the surrender of any certificate or in any other manner [R. T. 18, 23, 24]. Inspector LeRoy Riddlespurger then conducted a personal search of Appellant in the Customs House at which time he observed scarring on both arms and learned that Appellant had been arrested for possession of heroin on a prior occasion. No contraband was found at that time [R. T. 23]. Inspector had information to look out for Appellant. [R. T. 26]. Appellant was requested to remain at the office as a suspected violator of 1407 [R. T. 24, 30]. Appellant did not appear to be under the influence of a narcotic drug [R. T. 28].

Customs Agent Maxcy arrived at the Port of Entry about 5:35 p.m. that same day and interrogated Blackwell at which time he told the agent that he had arrived in the San Diego area and proceeded to Tijuana, Mexico, having arrived the morning of November 12 by airplane from San Francisco and that the purpose of his trip to Tijuana was to go to the race track and to visit a friend of his who lived in the area. He admitted he had been convicted on a charge for the sale of narcotics in the San Francisco area in June of 1960 [R. T. 33, 34].

Appellant was placed under arrest for failing to register as a prior narcotics violator and booked at the San Diego County Jail about 7:00 p.m. on November 12, where he remained under surveillance of jail officials. [R. T. 34, 35, 48]. Agent Maxcy returned to the County Jail and was present at the medical dispensary the following day at about 8:00 a.m. [R. T. 35]. At that time the jail physician examined Blackwell's arms and attempted to probe his rectum, during which time Blackwell was uncooperative and the doctor was unable to perform a satisfactory search [R. T. 36]. Following this Agent Maxcy was present with the Appellant at the San Diego County Jail from about 10:00 a.m. until 10:55 a.m. when Appellant stated to the Customs Agent that he had a quantity of heroin concealed in his rectum which he excreted at that time [R. T. 37, 38]. [Ex. I-A]. This substance was retained by the Customs authorities, analyzed by a Customs chemist and found to be methadon hydrochloride, a narcotic drug. [R. T. 38, 5-9, 10-16]. The Appellant stated regarding the contraband which was recovered from him that he had come from San Francisco the morning of November 12; that his sole purpose in coming to Tijuana was to purchase heroin; that he had purchased the narcotics from a man named Tony in Tijuana, that he had paid the sum of $150.00 for it, that it was all for his own use or for sale; and that upon returning to San Francisco he intended to sell it there. [R. T. 39, 40].

On cross-examination Agent Maxcy testified that he had information from a fellow agent that there was reason to believe that Blackwell had contraband concealed in his rectum. [R. T. 42]. It was stipulated

that there was information that Blackwell had brought a narcotic drug into the United States, that information had been received from this source in prior cases, and that the informer had received compensation for this information in accordance with the usual general practice [R. T. 42-44]. Agent Maxcy testified further that while a rectal probe was attempted it was never made to the satisfaction of the doctor and that a constant surveillance was maintained over Blackwell [R. T. 47-48]. The first time that Blackwell admitted that he had a narcotic substance contained in his rectum was shortly before 11:00 o'clock on November 13 [R. T. 41-50]. Agent Maxcy also checked the records pertaining to the registration of Appellant and found no evidence of Appellant having registered before he left the United States or returned to the United States on November 12, 1961 [R. T. 51].

The judgment pertaining to Blackwell's prior conviction was received in evidence as Exhibit 3 and it was stipulated that Blackwell at all times mentioned in Count Three was a citizen of the United States [R. T. 53].

Defense.

Customs Inspector Riddlespurger was called as a witness for appellant and testified that three or four minutes after Blackwell entered the United States a person named Willie Dean entered the United States in the pedestrian lane [R. T. 56]. Willie Dean went to the office to register as a narcotics addict where he was given a personal search also. He was not observed to be under the influence of a narcotic nor did he have any contraband on his person and the Inspector released

him [R. T. 57, 58]. At the time Dean left the office and was going out the door he advised Inspector Riddlespurger that Blackwell had narcotics on his person somewhere [R. T. 60].

Appellant testified in his own behalf that he had never visited San Diego or been to Mexico before this occasion [R. T. 64]. He testified he was using narcotics at the time he was arrested and had been using narcotics off and on since 1949 [R. T. 64]. He admitted having plead guilty to the charge of possession of narcotics [Ex. 3] [R. T. 65].

Appellant testified he first met Willie Dean in San Francisco on Saturday night, November 11, and that although he had seen him before he had never had any personal acquaintance with him. That he knew of Willie Dean as an addict and seller of narcotics. [R. T. 68]. That after being in another friend's house Appellant was asked to drop Dean off at his hotel. That he drove Dean back to his hotel and Dean told him about the fact that he had contacts in Mexico where he could get "the stuff for and good quality." Appellant testified that Dean importuned him to go to Mexico to obtain narcotics; that it was easy for Dean to contact people there; that good quality "stuff" could be obtained cheap there; and that there was little risk in going to Mexico [R. T. 68-69]. Blackwell stated that Dean impressed upon him that it was something Blackwell couldn't afford to pass up, so appellant went to different acquaintances and borrowed money [R. T. 70]. Blackwell stated further that after arriving in San Diego he and Dean stopped at Dean's relatives house in San Diego where they left the airline tickets at

Dean's suggestion; that the two hitchhiked to Mexico; that Appellant was not going into Mexico at first as Dean was to bring "it" in, but after coming this far he was inclined to follow Dean into Mexico to keep him from just running off with any money and not coming back [R. T. 74]; that Dean registered but suggested that Blackwell go across without registering because they didn't have any reason to stop him because they didn't know him [R. T. 75]. That Dean then met Blackwell in Mexico south of the Border and they rode around in a taxi until they met a man named Tony [R. T. 76]; that this cab driver then took Dean and Blackwell to a motel where they registered, took a room and waited for him to get the merchandise [R. T. 77]. That Tony brought the merchandise "back to the motel room where Dean tested it and appeared to pass out." That Dean left him with the narcotics and he thereafter concealed it in his rectum after which they returned to the Border. That Appellant had paid for the narcotics after the test had been made by Dean [R. T. 85, 86]. See Appendix A.

On cross-examination Appellant admitted that he had previously been convicted for narcotics violation, the conviction of which was introduced into evidence as Exhibit 3 and also had two prior felony convictions [R. T. 89]. He had obtained more than $150.00 because he had to pay expenses down and the $150.00 was the actual cost [R. T. 91]. He admitted that he had told Agent Maxcy that the sole purpose of the trip was to purchase hereoin; that he had purchased the "heroin" and that it was his money [R. T. 93, 94].

Offer of Proof.

Appellant offered to prove further by the testimony of Willie Dean that he had informed on other occasions and had received remuneration from the government on those occasions.[2] [R. T. 128-129].

Appellant also offered to prove by the testimony of a person named Large, who had come to San Diego for the purpose of obtaining narcotics, that Dean had assisted him in purchasing heroin in Mexico in the same manner as testified to by Appellant in this instance; and that Dean turned Large into Customs authorities using the same "technique." [R. T. 130].

Appellant offered to prove by Customs Agent Maxy that William Dean informed on other persons on prior occasions and received remuneration and special privileges from the government on these occasions [R. T. 130-132].

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[2]Willie Dean was called by the defense and testified [R. T. 96-120] but since his testimony did not enter into the decision of the Court it will not be included in this brief.

V.

ARGUMENT.

Entrapment as a Matter of Law Was Not Established by the Evidence Upon Which the Trial Court Rested Its Decision.

The undisputed facts show that while in Mexico Appellant placed a narcotic drug in his rectum; that he then proceeded to the San Diego Port of Entry where he walked into the United States without registering as a convicted narctoic violator, maintaining at the time of his entry at 4:20 p.m. on November 12, 1961; and thereafter for a period continuing until about 11:00 a.m. the following day that he did not have the narcotics which were in fact during this entire period concealed in his body cavity.

Notwithstanding these facts, Appellant contends the trial court could not find from Blackwell's own testimony, together with the facts assumed by the Court as presented in the offer of proof of Appellant, that Blackwell had voluntarily imported and concealed the heroin without any persuasion on the part of anyone. The claim in the offer of proof is essentially that Willie Dean, the informant in this case, had assisted a man named Large on a previous occasion to obtain narcotics by the "technique" testified to by Appellant in this case; that Dean had informed on Large and other smugglers and had received in return remuneration and special privileges from the Customs authorities.

The general rule is that if there is substantial evidence taking the view most favorable to the government to support a conviction, it should be sustained on appeal.

United States v. Glasser, 315 U. S. 60, 80 (1942).

In considering the facts, the reviewing court must ordinarily grant every reasonable intendment in favor of Appellee.

> *Arena v. United States,* 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Denied, 350 U. S. 954 (1956).

Limiting the argument to the testimnoy of Appellant and considering the offer of proof in the manner in which the trial court did, there is substantial evidence to support the findings of the trial court concerning the actions of Appellant upon which in turn the convictions rest.

Appellant testified he first met Willie Dean in San Francisco on a Saturday night, November 11, 1961, a person he had known as an addict and seller of narcotics. Blackwell stated that Dean importuned him in San Francisco to come down to obtain narcotics from Mexico. Blackwell admitted he had a prior narcotics conviction in 1960 which the evidence [Ex. 3] has shown was for the sale of narcotics.

Blackwell stated after Dean "stayed around . . . interesting me in this idea" that it was too good an opportunity to pass up; that it sounded good to him; that the narcotics would be cheap and good. Blackwell, that same night before he and Dean left San Francisco on the flight arriving at 11:00 a.m. in San Diego the following day, went to different acquaintances and raised the money for the narcotics. The narcotics were for the use of Blackwell as well as those other persons who had put money into it, and Blackwell would sell as much of it as would reimburse Blackwell for what he had put into it.

After arriving in San Diego, both Blackwell and Dean proceeded to Mexico where Blackwell gave as a reason for entering that ". . . naturally, I was inclined to follow him to keep him from just running off with my money and not coming back." [R. T. 75, 76].

Blackwell then testified that Dean made the arrangements in Mexico for the purchase of narcotics with a man named Tony and that Blackwell gave Tony that money for the narcotics after Dean had tested "it" and convinced Blackwell "it was the real thing." [R. T. 86]. Following that appellant said Dean "pretended" to pass out; that he tried to help Dean but that Dean went out and left him with the "merchandise" which he couldn't leave there, so he concealed same himself in his rectum (See Appendix A).

Blackwell stated he did not use any narcotics in Mexico himself because he had to keep a clear head, and if he was going to use anything, it was to be after he came back to the United States [R. T. 84, 85]. Following the concealment of the narcotic in his body cavity, appellant entered the United States without registering as a narcotics violator or user, where, as stated, he denied the presence of any narcotic on his person until the following day when he finally ejected it.

Appellant has referred to the case of *Sherman v. United States,* 356 U. S. 369 (1958) for the proposition that his testimony and the offer of proof have shown entrapment as a matter of law. This case is distinguishable as follows: Appellant here was not an addict within the meaning of the *Sherman* case; and there was an abandonment of the narcotics by the alleged inducer a considerable period before the offenses

were committed, which were independent acts by Appellant not the result of either inducement or addiction. Not only did the Appellant himself state he did not use the narcotic while in Mexico, but there was no evidence that he was under the influence of narcotics or suffering from symptoms of narcotics addiction. Appellant testified further that he placed the narcotic in his rectum with a "clear head"; stating that he couldn't leave the "merchandise" in Mexico and had no choice but to bring it into the United States. His reasons for bringing the narcotic into the United States were not that he had a compelling need to use it, but that his investment and that of others would be lost if he did not import it in the manner in which he did.

The case of *Lutfy v. United States,* 198 F. 2d 760 (1952) is likewise distinguishable from the instant case. There the Appellant testified he had never been in any way engaged in the narcotic traffic before contact by government agents; never been arrested; or had narcotics in his possession; and had no intention of engaging in the narcotic traffic or dealing in narcotics, and procured the heroin for the agents only because they urged and insisted he do so.

Here the Appellant by his own testimony had previously been arrested and convicted of a narcotics violation which implied a possession of narcotics at that time; he evidenced an interest in buying narcotics had Willie Dean had them available in San Francisco; he procured with money he had raised the instant narcotics not only for his own use but for sale and the use of his financiers; and he secured the narcotic in a particularly individualistic and unnatural manner unpersuaded by any person at the time he did so.

By Appellant's own testimony, Dean left him entirely alone in Mexico and displayed no interest in taking any narcotics into the United States. He thereupon took action of the most independent and affirmative nature possible, the very nature of which, that of forcing a sizeable object into a place contrary to nature and maintaining it there for many hours, shrieks of the independence of his acts at that time and thereafter.

Of course, concealment which occurred during the period following importation is a separate and distinct offense, as charged in Count Two. As stated in *Torres Martinez v. United States,* 220 F. 2d 740 at page 742 (1st Cir. 1955):

> "21 U. S. C. A. § 174 in the disjunctive establishes multiple offenses. It punishes not merely the act of selling, but also the act of fraudulently or knowingly importing narcotic drugs contrary to law, and the separate offenses, after such importation, of receiving, concealing, buying the same, or in any manner facilitating the transportation, concealment or sale thereof, knowing them to have been imported contrary to law. The language in Burton v. United States, 1906, 202 U.S. 344, 377, 26 S.Ct. 688, 697, 50 L. Ed. 1057, is applicable here, that 'Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied.' "

Aside from being a separate offense, this continued concealment for many hours is indicative of appellant's independent action in first concealing the narcotic, and inferentially supports the finding of the court that it

was initially secreted by an independent act not under the persuasion of anyone, thus negativing the alleged entrapment.

The case of *Masciale v. United States,* 356 U. S. 386 (1958) indicates at page 387 that the undisputed testimony by a person that an informer engaged in a campaign to persuade him to sell narcotics by using the lure of easy income does not of itself establish entrapment as a matter of law where the facts concerning alleged entrapment are properly considered by the fact finder.

The trial court has properly determined the issue of entrapment by virtue of its findings of fact which are amply supported by the evidence which was considered. The facts found do not establish entrapment as a matter of law and appellant is therefore not entitled to acquittal.

VI.
CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the District Court's finding of guilt should be affirmed as to all counts.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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APPENDIX A.

The following excerpts are taken from the Reporter's Transcript of Appellant's testimony, on direct examination at pages 78 and 81, inclusive:

"A. Well, after Tony brought this merchandise back, why, he put it on the dresser, and I opened it and examined it, and Dean, he also tested it, to determine whether it was what we was paying for. And as I said at first, I mean this was his agreement, to bring this back, but I think this is how I happened to end up with it—

Q. Please describe what happened. A. Dean tested the stuff and —

Q. Did he give you some A. And he gave me some, and the impression he gave me was that he had an overdose, or he was on the verge of passing out.

Q. Would you describe his actions to us? A. He just went to scratching all over his head, and all over his body, and pulling his clothes — you know, pulling his top clothes off, and, naturally, I was kind of excited and afraid he might have had an overdose, and that is dangerous, and I was kind of excited because it seemed that he might pass out.

Q. What did you do then? Did you do anything to try to keep him from passing out? A. I tried to keep him from passing out, and, also, I give him a bottle of this methadon. It counteracts narcotics. It is a stimulant, see, and I was trying to keep him from passing out, because we was over there, and we have to come back, and in the shape he is in, I know he has to come through the Cus-

toms and the inspection, and that he couldn't make it in that condition, and I was thinking of all of this.

Q. How did he talk? A. Well, his conversation didn't even — his words didn't even tie in in his conversation. I mean, he just acted like he had an overdose. He told me about how good it was, and that it was dynamite, and so forth, that it was real good quality, but Dean —

Q. About what time did this take place? A. Well, we got over there — we got into San Diego at about 11:00, and this was about 1:30 or 2:00 o'clock in the motel.

Q. And you had the plane to catch at around 5:00 o'clock? A. Yes.

Q. Would you describe what happened there in the next few hours? A. Well, after he didn't seem like he was going to come around — to come back to normal, I asked him if — I kept reminding him that we had to get across the Border, and we had our reservations for a certain time, and it seemed like he didn't care, or that he was just killing time, or didn't even care whether we got back or not.

And I just figured it was due to his having used too much. And he even left out of the room, and left me in there with this merchandise.

Now, I mean before he left, I asked him if he was going to make preparations so that we could leave and go back. In other words, I am asking him if he is going to wrap this stuff up and get ready, so that we can go.

But he told me that it didn't make him any difference. And so I didn't—well, I mean I didn't want it. But I had the impression that he wouldn't hardly make it back no how, not in the condition he was in. I was certain that he would be stopped if he tried to make it back with this merchandise, that he would probably get posted.

Q. After the time went by, and he was out of the room, you say he was down talking to someone else? Do you know who he was talking to? A. Well, after he left me, he was down talking to the hotel manager, and he was still talking, and this all seemed unnecessary talk, it seemed to me. He was talking about how good the motel was, and if he came back to Mexico he wanted to visit there and stay around the motel.

And it was getting late, and actually I couldn't leave the merchandise there, and it didn't seem like he would be able to make it back nohow, and it didn't seem like he had no intentions of taking it back anyway after we got over there.

Q. What did you do then? A. Well, I concealed it myself, because he didn't leave me no choice.

Q. And as to the technique, did you use the technique that he had told you about? A. I concealed it in my rectum, as he told me he had done previously, and he was present on this trip.

Q. Was he present when you did this? A. No."